No. 45881-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

COMMUNITY HEALTH PLAN OF WASHINGTON, a Washington health plan,

Respondent,

v.

MARYANNE LINDEBLAD, in her official capacity as Director of Washington State Health Care Authority; and WASHINGTON STATE HEALTH CARE AUTHORITY,

Petitioners,

and

COORDINATED CARE CORPORATION; UNITED HEALTHCARE; AND AMERIGROUP WASHINGTON, INC.,

Petitioner-Intervenors.

RESPONDENT'S ANSWER TO OPENING BRIEFS OF PETITIONERS AND PETITIONER-INTERVENORS

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Gary R. Tabor)

David B. Robbins, WSBA No. 13628
DRobbins@perkinscoie.com
Renee M. Howard, WSBA No. 38644
RHoward@perkinscoie.com
Matthew P. Gordon, WSBA No. 41128
MGordon@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Respondent
Community Health Plan of Washington

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. COUNTER-STATEMENT OF ISSUES 5

III. COUNTER-STATEMENT OF THE CASE 5

IV. ARGUMENT 21

A. Standard of Review 21

B. CHPW Is Entitled to Summary Judgment that HCA Breached the Contract by Unilaterally Changing How It Allocated Healthy Options Enrollees Among the Health Plans 22

1. The Contract's Plain Language Excludes Family Connect and Reconnect Clients from the Pool of Enrollees Available for Assignment 22

2. HCA's Intent to Disproportionately Favor the New Plans Is Irrelevant to the Dispute and Is Not a Material Fact Issue 25

3. HCA's Current Interpretation of the Assignment Methodology Is Unreasonable Because It Foreseeably Leads to an Absurd and Unworkable Result 27

4. Extrinsic Evidence Also Demonstrates that the Contract Excluded Family Connect and Reconnect Clients from the Assignment Methodology 31

a. The course of performance shows that Family Connects and Reconnects must be excluded in allocating enrollees 33

TABLE OF CONTENTS
(continued)

Page

b. Identical operative language in the parties' prior contracts and the parties' undisputed interpretation of them demonstrate that the Contract's allocation formula for unassigned provisions did not apply to Family Connect and Reconnect clients 38

C. CHPW Is Entitled to Summary Judgment that HCA Breached the Dispute Resolution Provisions in the Contract (Procedural Breach) 43

1. The Unambiguous Contract Language Required that Judge King "Hear and Determine" the Dispute Resolution Hearings 44

2. Extrinsic Evidence Supports "and" in Section 2.9.2 of the Contract as Conjunctive 46

3. Lindeblad's Unexpressed Intention Not to Delegate Her Decision-Making Authority to Judge King Is Irrelevant and Confirms HCA's Intention to Breach the Contract 49

4. Washington Law Permits HCA's Director to Delegate Her Decision-Making Authority, Which Lindeblad Chose to Do Under the Contract 50

5. That the Dispute Resolution Process Was Not a Formal Hearing Under the APA Does Not Mean that the Parties to the Contract Intended the Dispute Resolution Hearing Provisions to Permit a Sham Proceeding 51

6. CHPW Did Not Earlier Discover the Procedural Breach Because HCA Hid Judge King's Decisions from CHPW 52

7. No Declaratory Relief Is Needed to Establish a Breach of Contract 53

TABLE OF CONTENTS
(continued)

Page

D. The Trial Court's Decision Is Not Contrary to "Due Process" Because No Process Was Due to the New Plans, Who Were Not Parties to the Contract Between HCA and CHPW 55

E. The Trial Court Properly Determined that the Substantive and Procedural Breaches Caused HCA to Assign Fewer Enrollees to CHPW and that Damages Would Be Determined at a Later Proceeding 59

V. CONCLUSION 61

TABLE OF AUTHORITIES

Page(s)

Cases

Absher Constr. Co. v. Kent Sch. Dist. No. 415,
77 Wn. App. 137, 890 P.2d 1071 (1995) 44, 46

Allstate Ins. Co. v. Huston,
123 Wn. App. 530, 94 P.3d 358 (2004) 29

Am. Legion Post #149 v. Wash. State Dep't of Health,
164 Wn.2d 570, 192 P.3d 306 (2008) 45

Bank of Am., N.A. v. Owens,
173 Wn.2d 40, 266 P.3d 211 (2011) 21

Berg v. Hudesman,
115 Wn.2d 657, 801 P.2d 222 (1990) 30, 32, 33, 52

Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.,
166 Wn.2d 475, 209 P.3d 863 (2009) 23, 58

City of Tacoma v. City of Bonney Lake,
173 Wn.2d 584, 269 P.3d 1017 (2012) 38

Corbray v. Stevenson,
98 Wn.2d 410, 656 P.2d 473 (1982) 44

Diamond "B" Constructors, Inc. v. Granite Falls Sch. Dist.,
117 Wn. App. 157, 70 P.3d 966 (2003) 38

Go2Net, Inc. v. C I Host, Inc.,
115 Wn. App. 73, 60 P.3d 1245 (2003) 32

Hearst Commc'ns, Inc. v. Seattle Times Co.,
154 Wn.2d 493, 115 P.3d 262 (2005) 25, 26, 31

Jacoby v. Grays Harbor Chair & Mfg. Co.,
77 Wn.2d 911, 468 P.2d 666 (1970) 44

TABLE OF AUTHORITIES
(continued)

Page(s)

King v. Rice,
146 Wn. App. 662, 191 P.3d 946 (2008).....33

Lamon v. McDonnell Douglas Corp.,
91 Wn.2d 345, 588 P.2d 1346 (1979).....21

Mayer v. Pierce Cnty. Med. Bureau, Inc.,
80 Wn. App. 416, 909 P.2d 1323 (1995).....44

McGary v. Westlake Investors,
99 Wn.2d 280, 661 P.2d 971 (1983).....44

Pine Corp. v. Richardson,
12 Wn. App. 459, 530 P.2d 696 (1975) 44, 45

Pit River Tribe v. U.S. Forest Serv.,
615 F.3d 1069 (9th Cir. 2010) 59

Puget Sound Fin., L.L.C. v. Unisearch, Inc.,
146 Wn.2d 428, 47 P.3d 940 (2002).....38, 39

Scott Galvanizing, Inc. v. Nw. EnviroServs., Inc.,
120 Wn.2d 573, 844 P.2d 428 (1993).....46

Spectrum Glass Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.,
129 Wn. App. 303, 119 P.3d 854 (2005).....29, 32

Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.,
164 Wn. App. 641, 266 P.3d 229 (2011).....34, 35, 36, 37

State v. Tiger Oil Corp.,
166 Wn. App. 720, 271 P.3d 331 (2012).....30

U.S. Life Credit Life Ins. Co. v. Williams,
129 Wn.2d 565, 919 P.2d 594 (1996).....31, 46

TABLE OF AUTHORITIES
(continued)

Page(s)

Universal/Land Constr. Co. v. City of Spokane,
49 Wn. App. 634, 745 P.2d 53 (1987) 27

Wash. Monumental & Cut Stone Co. v. Murphy,
81 Wash. 266, 142 P. 665 (1914) 45

Statutes

42 U.S.C. § 1396u-2(a)(4)(D)(ii) 8

RCW 41.05.021(1) 50

Regulations

WAC 182-538-060 7

WAC 182-538-060(4)-(5) 24

WAC 182-538-060(8) ..... passim

Other Authorities

25 David L. DeWolf et al., Wash. Prac., *Contract Law & Practice* § 5:6 (3d ed. 2014) 32

Merriam-Webster Collegiate Dictionary (11th ed. 2012) 45, 46

Restatement (Second) of Contracts § 223 ..... 39, 40

Restatement (Second) of Contracts §§ 212, 214(c) (1981) 32

I. INTRODUCTION

This case concerns how the Washington State Health Care Authority ("HCA"), the state's Medicaid agency, allocated unassigned Medicaid clients among five health plans contracted to provide managed care service to Medicaid "Healthy Options" beneficiaries from July 1, 2012 until December 31, 2013. The relevant contract defined the universe of Medicaid enrollees who were to be allocated among the health plans under a contractual formula as "[p]otential HO [Healthy Options] enrollees who do not select a HO plan." CP 118. The parties dispute what constitutes "[p]otential HO enrollees who do not select a HO plan."

Although the underlying contract defined "Potential Enrollees" as Healthy Options clients who are not already enrolled with a health plan (CP 83), Petitioners argue that this group nonetheless includes certain Medicaid enrollees who were automatically enrolled with a health plan by operation of law through the "Family Connect" and "Reconnect" policies described in Section III.B below. HCA maintains that these "Family Connect" and "Reconnect" clients counted against each health plan's proportional share of Medicaid beneficiaries assigned to the health plans through a contractual assignment methodology.

HCA's current interpretation of the Healthy Options contract did not emerge until several months after the contract went into effect and not

until after the parties concluded their contractually required dispute resolution hearing on the issue. Prior to and throughout the dispute resolution hearing process, Petitioners maintained that "the [contractual assignment] methodology was applied as written" and that "[t]he methodology . . . did not take into account the number of clients assigned through the plan reconnection or family reconnection process." CP 3296. However, because the Petitioner-Intervenors (national insurers who were all new to managed Medicaid in Washington State) were dissatisfied with their initial enrollment numbers, HCA announced that it would "modify" assignment percentages four months into the contract to increase the number of enrollees assigned to the new plans. CP 191.

When Respondent Community Health Plan of Washington ("CHPW") challenged HCA's action as an impermissible unilateral modification of the contract, HCA argued that an unrelated contractual provision that addressed enrollment suspension gave it the right to modify the contractual assignment methodology when HCA deemed it appropriate. CP 702. HCA did not argue that the contract's original intent was to include Family Connect and Reconnect enrollees in the assignment pool until after Health Law Review Judge Clayton King (who was appointed as HCA's designee for the dispute resolution hearing) drafted an opinion concluding that HCA's unilateral modification of the enrollment

percentages was a breach of contract. Upon learning of Judge King's determination, HCA's Director MaryAnne Lindeblad ("Lindeblad") terminated Judge King's involvement, buried his decision, and then issued her own contrary determination that the modification was lawful, positing for the first time that HCA had always intended that the contractually allocated assignees include Family Connect and Reconnect clients. HCA's termination of Judge King's involvement was also contrary to the terms of the contract, however, which required that when, as here, the Director appointed another person to conduct a dispute resolution hearing, that person must "hear and determine the matter." CP 90 (emphasis added).

This interlocutory appeal concerns two partial summary judgment orders entered on CHPW's breach of contract claims. In the first order, the trial court found that HCA breached its contract with CHPW by unilaterally modifying how it allocates Medicaid clients among five contracted managed care plans, in derogation of the contractually required method for assigning those clients (the "Substantive Breach").

In the second ruling, the trial court concluded that HCA and Lindeblad breached the contract's dispute resolution provisions. The contract required that in the event a dispute arose between the parties, the Director must either conduct a dispute resolution hearing herself and issue

a determination, or delegate her authority to both "hear and determine" the parties' dispute. CP 90. It is undisputed that Lindeblad, after determining that Judge King was fit for the position because of his impartiality and distance from the contracting process (CP 1640), delegated to him the authority to preside over the dispute resolution hearings in her stead. Because Lindeblad delegated her authority to hear the dispute to Judge King, the trial court held that the contract also required Judge King to "determine" the parties' dispute. Because Lindeblad refused to permit Judge King to issue his decision in which he determined that HCA's unilateral modification was a breach of contract, and instead issued her own (contrary) determination, the court concluded that Lindeblad and HCA further breached the contract (the "Procedural Breach").

As a result of the Substantive and Procedural Breaches, the trial court found that CHPW was assigned fewer Medicaid clients than it otherwise would have received under the contractual assignment methodology and left calculation of damages resulting from these breaches to a trial on that subject alone. Prior to the damages trial, however, Petitioners and Petitioner-Intervenors moved for discretionary review of the summary judgment orders, which the Court granted.

II. COUNTER-STATEMENT OF ISSUES

1. In the Order on the Substantive Breach, did the trial court correctly determine that HCA breached the contractual provision for assigning certain Medicaid clients among contracted managed care plans when it adopted a new interpretation of the assignment pool that included clients already assigned to a health plan by operation of law?

2. In the Order on the Procedural Breach, did the trial court correctly determine that HCA and Lindeblad breached the plain language of the contractual dispute resolution requirement that any delegate appointed by Lindeblad to hear the parties' dispute about Medicaid client allocation both "hear and determine" the dispute?

3. In both Orders, did the trial court correctly determine that there was no genuine issue of material fact that the Substantive and Procedural Breaches resulted in assignment of fewer Medicaid clients to CHPW than otherwise would have been assigned, resulting in damages to CHPW (the amount of which was to be determined in a subsequent proceeding)?

III. COUNTER-STATEMENT OF THE CASE

A. HCA Awarded Contracts to CHPW and Four Other Health Plans to Serve Healthy Options Clients from July 1, 2012 Through December 31, 2013.

CHPW is a Washington nonprofit community-based health plan that was formed by the state's federally qualified health centers and

migrant health centers. Since it was founded in 1992, CHPW's operation has focused on providing managed care services to enrollees of the Washington State Medicaid program under a succession of contracts with the state. Of the Medicaid managed health plans now operating in Washington, CHPW is the only nonprofit health plan and the only plan whose entire operations are based in Washington and devoted to Washington residents.

In September 2011, HCA issued a Request for Proposals ("RFP") to managed care organizations who wished to contract with HCA to administer managed care services to certain Medicaid enrollees known as "Healthy Options" enrollees. CP 219-50. CHPW and Molina Healthcare of Washington Inc. ("Molina"),[1] which had both previously contracted with HCA to provide managed Medicaid services in the state (collectively referred to as the "Legacy Plans"), successfully bid on the RFP. CP 56-57. HCA also awarded contracts to three managed care organizations that were new to managed Medicaid care in Washington, Intervenors Amerigroup Washington, Inc., Coordinated Care Corp. ("Coordinated Care"), and UnitedHealthcare of Washington, Inc. (collectively referred to

[1] Co-plaintiff Molina challenged the contractual modification and followed the identical course described herein related to CHPW through the trial court's partial summary judgment rulings and the appeal thereof. Molina is no longer a party because HCA settled with it while this appeal was pending. *See* Stipulated Ruling of Dismissal as to Respondent Molina Healthcare of Washington, Inc. (Oct. 3, 2014).

as the "New Plans"), all for-profit health plans whose parent corporations are located elsewhere. *Id.* In March 2012, all five plans entered into separate but substantially similar contracts with HCA entitled "Managed Care Contract: Basic Health and Healthy Options" ("Contract"). *Id.* HCA informed the plans that they could not negotiate changes to the Contract's terms before executing it (indeed, a condition of the RFP was that the responding party was obligated to sign the Contract as drafted). CP 238 (RFP Section B.27).

B. Allocation of Healthy Options Clients Under the Contract

The Contract allocated unassigned Medicaid enrollees to the contracting managed care organization by an assignment methodology that was described in the RFP. The contractual assignment methodology existed to allocate among the five health plans those Healthy Options enrollees who had not already self-selected a particular plan or who were not already enrolled with a specific managed care plan by operation of law.

Under state law and the terms of the Contract, Medicaid managed care enrollees are free to select any managed care plan that is currently enrolling new members in the enrollee's service area (i.e., county). WAC 182-538-060; CP 118 (Contract § 5.13.3). Obviously, there is no need to determine assignment of Medicaid enrollees who have already chosen a

plan. Additionally, HCA's regulations establish two policies that automatically assign certain Medicaid enrollees to a particular health plan.

Under the first policy, known as the "Family Connect" policy, HCA automatically enrolls a new Healthy Options client (e.g., a newborn) in the same health plan as the client's family member (e.g., the newborn's mother). CP 118 (Contract § 5.13.6). The policy is intended to honor the family member's (typically, mother's) choice of plan and lend continuity and efficiency to family medical care. This plan selection for families is also mandated by both federal and state law. 42 U.S.C. § 1396u-2(a)(4)(D)(ii); WAC 182-538-060(8), (9).

Under the second automatic assignment policy, known as the "Reconnect" policy, Healthy Options enrollees who temporarily lose and then regain Healthy Options eligibility within a twelve-month period are automatically restored to the health plan in which they were enrolled before losing eligibility. CP 118 (Contract § 5.13.6). For example, if a plan member loses Medicaid eligibility for a week or a month, that member is reassigned to the plan he or she previously chose and that previously managed that member's care. The Reconnect policy is intended to honor the enrollee's choice of plan and maintain continuity of that member's care. This assignment is mandated by HCA regulation and thus occurs by operation of law. *See* WAC 182-538-060(8)(b).

An enrollee who does not fall into one of the above categories required assignment to one of the managed care plans contracted in the enrollee's service area. The Contract addressed the assignment of those individuals, referred to as "Potential Enrollees," as follows:

> Potential HO enrollees who do not select a HO plan shall be assigned to a HO Contractor by HCA as follows:
>
> 5.14.1.1 For the period July 1, 2012 through December 31, 2013, assignments will be made as described in the Request for Proposals that resulted in this Contract.
>
> 5.14.1.2 In any subsequent extension to the Contract, HCA will make assignments based on cost and performance measures and by methods designed and selected by HCA.

CP 118 (Contract § 5.14.1) (emphasis added).

A "Potential HO Enrollee" is defined as "any individual eligible for enrollment in Healthy Options under this Contract who is not enrolled with a health care plan having a contract with HCA." CP 83 (Contract § 1.70) (emphasis added).[2] In other words, Potential HO Enrollees (who

[2] The brief will reference the terms "Potential HO Enrollees" and "Potential Enrollees" interchangeably. The term "Potential HO Enrollees" (where the "HO" refers to "Healthy Options") is used and defined in the instant Contract identically to the term "Potential Enrollees" as used and defined in the previous contract between CHPW and HCA covering managed Medicaid services. The difference between the contracts is that the instant Contract encompasses the Basic Health Program and other public insurance programs in addition to the Healthy Options program, while the earlier contracts do not. Importantly, the Family Connect and Reconnect policies apply only to Healthy Options beneficiaries, which is among the reasons that the instant Contract refers to "Potential *HO*

are subject to the contractual assignment methodology) are Medicaid clients who are not enrolled in a health plan. Individuals who are enrolled with a health plan (and who thus were excluded from the definition of Potential HO Enrollees) include individuals who select and enroll in a plan of their choice and Medicaid clients who, by operation of law, are automatically enrolled in a plan through the Family Connect and Reconnect policies. Indeed, the Contract expressly refers to the operation of these policies in the "Order of Acceptance" provision: "The Contractor shall accept clients who are enrolled by HCA in accord with this Contract and Chapters 182-538 [Family Connect] and 388-542 [Reconnect] WAC." CP 118 (Contract § 5.13.6). The contractual definition of "Potential Enrollees" was the same definition as existed in the prior contract between CHPW and the state, which HCA admits it interpreted as excluding Family Connect and Reconnect clients. CP 1409, 1502.

The assignment methodology for "Potential HO enrollees who do not select a HO plan" (i.e., individuals who are not enrolled with any plan by law or choice) is contained in Section D of HCA's RFP, which provides:

> 1. For each Service Area assignment will be calculated as follows:

Enrollees". *See* note 15, *infra*.

If a Bidder proposes to serve a Service Area [county] that Bidder has not serve [sic] under the prior Healthy Options contract and the Bidder is awarded a contract in that Service Area, that Bidder will receive 50% of the assignments in the Service Area. If more than one Bidder enters a new Service Area that assignment will be apportioned based on the weighting described herein. Entering a new Service Area means that the Bidder has not contracted with HCA and provided managed care services to enrollees in that Service Area at any time in the twelve months prior to the execution of the contract resulting from this Procurement. The remainder of the assignments in the Service Area (100% if there are no new entries) will be apportioned between all Bidders based on the weighting described herein.

2. The remainder of the assignments (100% if there are no new entries) of assignments [sic] will be made as follows:

40% Rates [sic] scores for the Service Area

14% Access to Care and Provider Network scores

14% Care Management Scores

14% Quality Assurance and Performance Improvement scores

9% Utilization Management Program and Authorization of Services and Grievance System Scores

9% Program Integrity Scores.

CP 64 (RFP Section D) (emphasis added).

As Section D of the RFP reflects, the assignment methodology gives preferential treatment to the New Plans (which did not have prior Healthy Options contracts) by awarding to any plans that were new to a particular service area at least half of the assignments of Potential Enrollees in the service area. *Id.* As the New Plans had not previously served Washington Medicaid beneficiaries, they were entitled to receive that preference in all counties in which they won bids.

The parties' dispute, which resulted in CHPW's requesting a dispute resolution hearing under the Contract, centers on which members are in the enrollee assignment "pool" to be allocated by the above-described assignment methodology. Or, in short, whether "Potential HO Enrollees" include Family Connect and Reconnect clients who are enrolled by operation of law.

CHPW argued, and the trial court agreed, that the Contract's assignment methodology by its plain language applied only to "Potential Enrollees," which by definition includes only those Healthy Options members not already enrolled with a health plan, and thus excluded those already enrolled with a managed care plan, either by choice or by operation of law. As a result, Family Connect and Reconnect client assignments do not count against each plan's proportional share of

assignments under the assignment methodology, for the simple reason that those assignments are made automatically by operation of law and thus occur outside of contractually determined assignment and enrollment.

Indeed, it is undisputed that when the Contract started on July 1, 2012, HCA assigned clients to the New Plans and the Legacy Plans consistently with this interpretation—i.e., not counting Family Connect and Reconnect clients as Potential Enrollees. It is also undisputed that HCA's assignment practices in the initial months of the Contract were consistent with its past practices. CHPW's immediately preceding Healthy Options contract also included a contractual assignment provision that allocated only "[p]otential enrollees who do not select a Healthy Options/SCHIP plan." CP 910, 2959. It is further undisputed that under those previous agreement, Family Connect and Reconnect clients were not counted toward each plan's assignment allocation. CP 1409, 1502.

C. In Response to New Plan Complaints, HCA Modified How It Allocated Unassigned Healthy Options Enrollees.

Following complaints from the New Plans that the number of enrollees they were receiving under the Contract did not meet their internal projections, however, HCA announced that it would alter the assignment methodology a few months into the Contract's term.

Specifically, on August 23, 2012, HCA Division Director of Health Care Services Preston Cody notified CHPW and Molina that, even

though HCA had "strictly followed" the assignment methodology "protocol" in the RFP and Contract, the number of Healthy Options enrollees assigned to Molina and CHPW was greater than HCA had anticipated, despite the 50% assignment preference for the New Plans. CP 191. HCA stated that it would therefore impose "a modification of the assignment percentages starting with the November 2012 enrollment." *Id.* (emphasis added). On September 10, 2012, Cody sent CHPW (and Molina) a letter confirming HCA's intent to modify the assignment methodology. CP 193-94.

After receiving the September 10 letter, Molina and CHPW requested dispute resolution hearings in accordance with the Contract. CP 26, 196-98. The Contract's dispute resolution process provides that if a dispute arises, a party "may request a dispute resolution hearing with the Director." CP 90. The Contract further provides that upon receiving the dispute resolution hearing request, the Director shall either (1) hear the matter herself, consider all the evidence available and render a written recommendation within thirty days of the hearing, or (2) appoint a designee to "hear and determine the matter." *Id.* This dispute resolution process "shall precede any judicial or quasi-judicial proceeding and is the sole administrative remedy under this Contract." *Id.*

Lindeblad appointed an HCA-employed Health Law Review Judge, Clayton King, as her designee for the CHPW and Molina dispute resolution hearings. CP 1640. HCA confirmed that Judge King was selected for his "knowledge of Medicaid managed care, his experience participating in and presiding over hearings (as well as, obviously, reviewing them), and his critical distance from the entire H[ealthy] O[ptions] procurement process." *Id.* Following his appointment, HCA provided Judge King with "additional background information," including Plaintiffs' position papers and the text of Section 2.9 of the Contract. CP 1648.

Judge King reviewed Section 2.9 and understood that he would "decide" the matter and then "meet with Ms. Lindeblad before issuing any decision." CP 1653-54. He understood that "his decision was going to go out one way or the other, [but] it was a question of whether it'd be over [his] signature or [Lindeblad's]." CP 1655.

HCA never argued in its position papers or at the two dispute resolution hearings[3] before Judge King that the Contract required it to include Family Connect and Reconnect clients in the Potential Enrollee allocation pool, or that this practice was consistent with the RFP's

[3] Separate dispute resolution hearings were held for Molina and CHPW.

allocation methodology. In other words, HCA never argued that the assignment methodology had been implemented incorrectly. Indeed, while the hearings were pending, HCA staff internally confirmed that "the [RFP] methodology was applied as written. The methodology in the RFP did not take into account the number of clients assigned through the plan reconnection or family connection process." CP 3296.

Instead, HCA's position in the dispute resolution hearings was that it had the right to unilaterally modify the contractual allocation methodology because "[s]ection 5.13.4 of the . . . Contract allows the HCA to '. . . suspend voluntary enrollment or assignments in any service area, if, in its sole judgment it is in the best interest of HCA and/or its enrollees.'" CP 200-03, 699-702. HCA officials who participated in the hearings and drafted the position papers were the same officials who drafted the Contract and RFP, including the enrollee assignment provisions, and managed its implementation.

CHPW responded that the "Contract does not permit such a [unilateral] modification" to the assignment methodology. CP 696. The enrollment suspension provision at Section 5.13.4 of the Contract was inapplicable to the facts and "does not authorize HCA to re-jigger the percentage of enrollees assigned to the plans in a way that is inconsistent with the assignment protocol." CP 694. CHPW argued that this provision

"[a]t most . . . permits HCA to temporarily stop assignments in a given service area," presumably when the plan's providers reached capacity or when there was a quality of care concern. *Id.*

Despite the pending dispute resolution hearings, HCA modified the contractual assignment methodology in October 2012 by reducing the number of Potential Enrollees assigned to CHPW and Molina and assigning a greater number to the New Plans. CP 1625-26.

The dispute resolution hearings for Molina and CHPW occurred on October 2 and October 10, 2012, respectively. Judge King presided over both hearings. At no time before, during, or after the hearings did Lindeblad or any HCA employee inform CHPW, Molina or Judge King that Lindeblad intended to revoke or bifurcate Judge King's authority to "hear and determine the matter" under Section 2.9.2 of the Contract. CP 1608-09, 1666, 1673-74. In any event, any such revocation or bifurcation would have violated the Contract, which required that, if delegation occurred, the Director's delegate must "hear and determine the matter." CP 90 (emphasis added). The hearings were not transcribed or recorded, although an HCA secretary took some notes. Lindeblad did not attend either hearing. CP 1727, 1737.

Consistent with his contractually delegated duty to "hear and determine the matter," after presiding over the hearings, Judge King

prepared written decisions for the CHPW and Molina disputed. CP 1663. In both decisions, Judge King determined that HCA had breached the Contract by modifying the assignment methodology:

> It is the determination of the Director's designee that the action taken by the Agency [HCA] described in the September 10, 2012 letter is a modification of the contract which must comply with section 2.1 of the contract. It is not an exercise of the discretion granted to the Agency in section 2.1, section 5.13.4, or any other part of the contract. Since the requirements of section 2.1 were not complied with prior to this action, the Agency action constitutes a breach of contract.
>
> . . . .
>
> The undersigned can only apply the contract as written.

CP 1747, 1750, 1752, 1758 (emphasis added).

Judge King emailed his written determinations to the Attorney General's Office on October 24, 2012 and two days later met with Lindeblad and other HCA representatives to explain his rulings. CP 1656, 1660, 1669. At no time during the meeting did Lindeblad or other HCA officials tell Judge King that he had misconceived or misstated HCA's legal argument for modifying the Contract. CP 1681. Following the meeting, Judge King continued to refine the draft of his written determinations in anticipation of issuing them within thirty days of the

hearings, as required by the Contract. CP 90, 1664, 1673-75. He never issued them, however, because Lindeblad's secretary called Judge King to inform him that he was "off the hook," and "that was [the] end of [his] involvement." CP 1667-68. HCA's abrupt termination of Judge King's involvement was "contrary to [his] expectation" and inconsistent with his understanding that the Contract required him to rule on the matter. CP 1655, 1683-84.

Rather than issue the decisions of her designee, Judge King, Lindeblad issued her own decision, ghostwritten on an ex parte basis by the Assistant Attorney General (William Stephens) who appeared on behalf of the HCA staff at the CHPW dispute resolution hearing. *See* CP 1772-75 (draft letter), 1776 (metadata showing author as "bills3").[4]

In that decision, Lindeblad on behalf of HCA argued for the first time that HCA's modification of the assignment methodology was not a breach of contract because the Contract's language was "ambiguous" and modification of the assignment methodology was necessary to align the methodology with the parties' original intent. CP 1779. Lindeblad

[4] The Attorney General's office assigned a different Assistant Attorney General to advise Judge King on the hearings, presumably to keep an ethical separation between the attorney representing a party in an adversarial hearing from the one who advised the Health Law Review Judge employed by the same agency. CP 1646. That ethical wall was breached when Mr. Stephens, unbeknownst to CHPW, drafted the agency's ultimate decision.

offered no explanation as to how her interpretation was consistent with CHPW's or Molina's intent, much less HCA's. Further, her letter cited no evidence that the health plans had advance notice that HCA would implement the same assignment language used in its preceding Healthy Options contract in a diametrically opposite way (i.e., that HCA would now for the first time include Family Connect and Reconnect clients in the universe of "potential enrollees who do not make a choice in HO plan," the same assignment universe that existed in the prior contract between the parties). CP 910. Lindeblad's ruling was that HCA would modify the methodology to count Family Connect and Reconnect clients in the assignment pool for the remaining fourteen months of the Contract's term.

Moreover, Lindeblad did not attend the dispute resolution hearings, nor were transcripts made that she could have reviewed. CP 1613, 1659. Further, Lindeblad had no personal involvement in the RFP, the drafting of the Contract, or its execution or initial implementation because she was not employed by HCA when those events occurred. CP 1611. Accordingly, Lindeblad had no personal basis for discerning the parties' intent.

HCA never disclosed Judge King's decisions to CHPW. CP 1781, 1955. Lindeblad testified that telling Plaintiffs about Judge King's decisions "wasn't a consideration." CP 1622. CHPW did not learn of

Judge King's decision about its dispute (and Lindeblad's wresting of decision-making authority from him) until it obtained copies of his draft decision pursuant to a public records request after it filed a lawsuit. CP 1781, 1955. Upon discovering this information, CHPW and Molina amended their complaint to add allegations relating to the Procedural Breach. CP 1233-34, 1236 (First Amended Complaint ¶¶ 36-38, 47).

When announcing its rulings on the partial summary judgment motions, the trial court observed that Petitioners' failure to abide by the dispute resolution requirements was a breach of contract and characterized HCA's conduct as "an affront to reasonableness." CP 3367.

IV. ARGUMENT

A. Standard of Review

The Court reviews the trial court's orders de novo. *Bank of Am., N.A. v. Owens*, 173 Wn.2d 40, 48-49, 266 P.3d 211 (2011). In reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court—whether the pleadings, affidavits, depositions and admissions on file demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A material fact "is a fact upon which the outcome of the litigation depends, in whole or in part." *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

B. CHPW Is Entitled to Summary Judgment that HCA Breached the Contract by Unilaterally Changing How It Allocated Healthy Options Enrollees Among the Health Plans.

1. The Contract's Plain Language Excludes Family Connect and Reconnect Clients from the Pool of Enrollees Available for Assignment.

HCA's argument that the Contract's assignment methodology was intended to include Family Connect and Reconnect clients in the assignment pool defies the plain language of the Contract and common sense.

First, as noted, the Contract's enrollee assignment provision applied only to "Potential HO enrollees who do not select a HO plan." CP 118 (Contract § 5.14.1). A "Potential HO Enrollee" is defined as "any individual eligible for enrollment in Healthy Options under this Contract who is not enrolled with a health care plan having a contract with HCA." CP 83 (Contract § 1.70) (emphasis added). Under this definition, a Healthy Options beneficiary who is already enrolled with a health plan by operation of law is not a Potential Enrollee and thus does not require assignment. For example, a person who is automatically connected to his or her family member's plan (e.g., a newborn) is enrolled with that plan and does not need to be assigned. The same exists for individuals who have temporarily lost and then regained Healthy Options eligibility. Those individuals are automatically reconnected to their previous health plans and thus are not Potential Enrollees because they are already

"enrolled with" a plan as a matter of law. The relevant regulations make this clear: Family Connect clients are by law "enrolled with" their families' plans, and similarly Reconnect clients are "reenrolled with" their prior plans. WAC 182-538-060(8)(a), (b). These enrollments are determined and occur automatically by law and not by contract.

The Contract's reference to "[p]otential HO enrollees who do not select a HO plan" logically excludes not only those individuals who were already enrolled with a plan by operation of law as explained above (e.g., through the Family Connect and Reconnect policies) but also those who chose to enroll in a plan of their choice.[5] Individuals who "select a HO plan" also did not require assignment via a contractual formula (because they have affirmatively chosen a plan) and thus were also not among the pool of enrollees to be allocated among contracting health plans. *See Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009) (the terms of a contract must be read together so that no term is rendered ineffective or meaningless).

HCA's own regulation describing the process for assignment of managed Medicaid clients mirrors the Contract's order of operations and

[5] This automatic enrollment of Family Connect and Reconnect clients also in fact does reflect the enrollee's self-selection, as the family member has already selected the family's health plan in the case of Family Connect clients, and the member has selected his or her health plan before temporarily losing Medicaid eligibility in the case of Reconnect clients.

confirms the meaning of the Contract's plain language. First, the regulations specify that all clients have the ability to choose a provider available in the area where the client resides. WAC 182-538-060(4)-(5). Second, certain clients who "do not choose an MCO" are automatically enrolled in a specific health plan by HCA as follows: (1) "[i]f the client has a family member or family members enrolled with an MCO, the client is enrolled with that MCO" (WAC 182-538-060(8)(a)); (2) if the client was previously enrolled, "the client is reenrolled with the same MCO []provider" (WAC 182-538-060(8)(b)). Third, HCA's rules state that "if the client cannot be assigned according to (a) [Reconnect] or (b) [Family Connect], the agency assigns the client" "to an MCO available in the area where the client resides." WAC 182-538-060(8)(c)(i).

Thus, any agency-directed enrollee allocation methodology can apply only to those Medicaid clients who have not chosen a plan and who have not been automatically enrolled with a plan by operation of law. As for the latter category of clients, the rules are explicit that Reconnect and Family Connect clients are "enrolled with" their plans automatically and in fact have self-selected those plans. As such, they cannot be considered "Potential HO Enrollees" under the Contract's definition of that term and thus are not within the pool of clients to be allocated among the health plans under Section 5.14.1 of the Contract.

The trial court did not err in concluding that (i) the Contract's plain language excluded Family Connect and Reconnect clients from the assignment pool; and (ii) HCA breached the Contract by unilaterally modifying the assignment percentages four months into the Contract to include those individuals in the assignment pool in order to decrease the enrollees available for assignment to CHPW and increase the enrollees available for assignment to the New Plans. The fact that HCA or the New Plans may have subjectively intended a different result from the contractual allocation (e.g., more enrollee assignments for the New Plans than actually occurred) is irrelevant; the court does not "interpret what was intended to be written but what was written." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

2. HCA's Intent to Disproportionately Favor the New Plans Is Irrelevant to the Dispute and Is Not a Material Fact Issue.

As noted above, after the Contract was initially implemented, the New Plans complained to HCA that they were receiving fewer enrollees than they anticipated, notwithstanding their preferential treatment under the Contract. Although a variety of reasons might explain the discrepancy,[6] HCA informed CHPW that it was nonetheless imposing "a

[6] For example, the New Plans had difficulty getting sufficient numbers of healthcare providers to contract with them by the Contract's start date, which prevented them from accepting assignments of new enrollees in certain service areas when the Contract began.

modification of the assignment percentages" and sent each plan a letter confirming its intent to modify the assignment methodology starting with the November 2012 enrollment. CP 193-94. HCA's announcement acknowledged that HCA had "strictly followed" the Contract and RFP assignment methodology to that point, but that the "modification" was necessary to effectuate its intent to provide enhanced enrollment for the New Plans. *Id.*

In this appeal, HCA argues that the trial court, when interpreting the assignment provision of the Contract for purposes of the Substantive Breach, disregarded evidence that it generally intended the assignment methodology to favor the New Plans and even more generally intended to attract new managed care plans to Washington. HCA Br. at 24. Such intentions are not relevant to the breach of contract claim. This dispute is about a specific contractual allocation methodology and whether HCA breached its Contract with CHPW when it changed that methodology in the middle of the term. That HCA wished to bring new managed care plans into the state is probative of very little given that the Contract's only

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See, e.g., CP 2335-36 (Coordinated Care's initial assignment matrix showing HCA designated it as having "emerging network" status in nine counties for which it won the bid but had inadequate providers to serve the population, which in turn meant that its "assignment proportion" was zero for those counties).

express manifestation of that intent is its assignment of the first 50% of enrollees who are in the assignment pool to the New Plans.[7]

There is no evidence in the record that, prior to entry of the Contract, HCA intended to favor the New Plans by configuring an assignment pool to include Family Connect and Reconnect clients or ever communicated such an intent to any of the plans that it intended to favor the New Plans by reconfiguring the assignment pool. And, even if HCA silently believed that the Contract's preferential assignment methodology did not advantage the New Plans enough, that belief is not relevant to the issue before the Court: Whether the plain language of the Contract and objective evidence and circumstances demonstrate that CHPW and HCA intended to exclude Family Connect and Reconnect clients from the assignment pool, and thus whether HCA's alteration of the Contract to include those enrollees in the pool was a breach of contract.

3. HCA's Current Interpretation of the Assignment Methodology Is Unreasonable Because It Foreseeably Leads to an Absurd and Unworkable Result.

"A contract susceptible to a reasonable or unreasonable construction should be given a reasonable one." *Universal/Land Constr.*

[7] HCA argues that CHPW knew of this preferential intent and lobbied the legislature against it. HCA Br. at 34. However, the fact that CHPW lobbied against the 50% assignment to New Plans of those in the pool in no way supports the notion that CHPW understood the Contract to require a change in the composition of the pool itself and there is no evidence in the record to suggest that it did.

Co. v. City of Spokane, 49 Wn. App. 634, 638, 745 P.2d 53 (1987). HCA's construction of the Contract's assignment methodology is unreasonable, as it was plainly and foreseeably unworkable and would lead to a violation of either HCA's Family Connect and Reconnect regulations or the terms of the Contract itself.

The problem is plain whenever the number of individuals automatically enrolled with CHPW (and Molina) through the Family Connect and Reconnect policies in a given month exceeds 50% of the enrollee allocation pool as HCA now argues it intended. In such a month, HCA would have to either violate the Contract's preferential assignment methodology by assigning less than 50% of the enrollees in the pool to the New Plans or it would be required to violate the Family Connect and Reconnect regulations (and also the Contract, which incorporates those policies by reference) by reassigning the excess Family Connect and Reconnect clients to the New Plans instead of to CHPW.

The unworkability of HCA's position is not merely theoretical. In her deposition, Lindeblad admitted that it was "absolutely" likely that this situation would occur under HCA's interpretation of the Contract. CP 1419-20. Indeed, HCA noted in its brief that "approximately 70% of monthly enrollment is comprised of Plan Reconnect or Family Connect

enrollees." HCA Br. at 12 (citing CP 3207).[8] Assuming the accuracy of HCA's figure, it would be mathematically impossible to assign to the New Plans at least 50% of enrollees in the assignment pool, as HCA currently conceives of it, without assigning to them some of the Family Connect or Reconnect clients, in violation of HCA's own regulations. This impossibility demonstrates the unreasonableness of HCA's proposed interpretation. *See, e.g., Spectrum Glass Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 129 Wn. App. 303, 313, 119 P.3d 854, 859 (2005) (rejecting proposed interpretation of contract "that makes it impossible" to give effect to two contract terms).[9]

Although HCA argues that it could address this absurd result by correcting "[a]ny imbalances in particular months" over time "or through other means at HCA's disposal" (CP 2150 n.27), HCA cites no Contract provision that gave it authority to alter the assignment percentages monthly to "rebalance" assignments. More importantly, HCA's argument

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[8] *See also* CP 918 (CHPW's declaration that as of November 1, 2012, 54% of its enrollees were assigned through the Family Connect and Reconnect programs).

[9] The unreasonableness of this interpretation is further demonstrated by the fact that the Contract actually includes a weighted assignment methodology. If 70% of monthly enrollment consists of Reconnect and Family Connect clients, then, under HCA's suggested interpretation of the Contract, CHPW would never be assigned enrollees who were not enrolled by operation of law, and the contractual provision that specifies weighted assignments would never apply. *See Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 541-42, 94 P.3d 358 (2004) (rejecting proposed contract interpretation that would render one clause "surplusage" and thereby "violate the rules of contract construction").

fails because it ignores the fixed eighteen-month term of the Contract. If it were a contract with an indefinite term, the Contract could be extended until overassignments of enrollees were offset by corresponding underassignments. But the instant Contract had a fixed eighteen-month term. Thus, even if HCA wanted to rebalance assignments from month to month, the cumulative or monthly problem could well exist in the last month of the Contract, leaving HCA with the foreseeable and untenable choice of either violating its regulations by depriving Family Connect and Reconnect clients of their legally required assignment or violating its new-found interpretation of the Contract by assigning them in numbers inconsistent with the contractually weighted allocation.[10]

The Court should avoid a "strained or forced construction" that would lead to absurd results. *See State v. Tiger Oil Corp.*, 166 Wn. App. 720, 762, 271 P.3d 331 (2012) (internal quotation marks and citation omitted); *see also Berg v. Hudesman*, 115 Wn.2d 657, 672, 801 P.2d 222 (1990) ("When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we adopt the latter

[10] HCA's Preston Cody testified that HCA never considered how it would deal with this conundrum prior to entry into the Contract, and still had not determined how it would resolve this issue four months into the Contract's term. CP 1477-79.

interpretation.") (internal quotation marks and citation omitted). HCA could not have possibly intended this result.

By contrast, CHPW's interpretation of the assignment provision is not only consistent with the plain meaning of the Contract's terms, including the definition of "Potential Enrollee," but is also entirely workable: (i) Family Connect and Reconnect clients are not included in the assignment pool (given the plain language of the definition of "Potential Enrollees"); (ii) the New Plans receive 50% of all clients actually in the pool (e.g., those who have not affirmatively chosen a plan or were not automatically enrolled in a plan by operation of law), as well as their weighted-score percentage; and (iii) HCA is not forced to choose between following its Family Connect and Reconnect rules and honoring the Contract's terms.

4. Extrinsic Evidence Also Demonstrates that the Contract Excluded Family Connect and Reconnect Clients from the Assignment Methodology.

The court's goal in interpreting a contract is to ascertain the parties' mutual intent. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996). Under the "objective manifestation" theory of contracts, a court determines intent by looking at the objective manifestations expressed in the contract rather than at the parties' unexpressed subjective intentions. *Hearst*, 154 Wn.2d at 503.

Summary judgment is appropriate when the contract, viewed in light of the parties' objective manifestations, has only one reasonable meaning. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003).

Although CHPW maintains that the Contract's plain language is sufficient proof of the parties' intent regarding enrollee allocation, extrinsic evidence provides further confirmation, and may be considered by the Court. Under the "context rule," extrinsic evidence may be used to show the parties' situation and the circumstances under which the parties executed the contract for purposes of ascertaining the parties' intent and construing the contract. *Berg*, 115 Wn.2d at 669. This means that extrinsic evidence may be considered regardless of whether the contract terms are ambiguous. *Id.* (adopting Restatement (Second) of Contracts §§ 212, 214(c) (1981)).

Relevant extrinsic evidence may include, among other things, the parties' statements made in preliminary negotiations, a course of performance of the present agreement, a course of dealing in other transactions or contracts, and the reasonableness of the parties' respective interpretations. *See Spectrum Glass Co.*, 129 Wn. App. at 310 (citing *Berg*, 115 Wn.2d at 666-68); 25 David L. DeWolf et al., Wash. Prac., *Contract Law & Practice* § 5:6 (3d ed. 2014). Any ambiguity not

resolved by extrinsic evidence will be construed against the drafter. *King v. Rice*, 146 Wn. App. 662, 671, 191 P.3d 946 (2008).[11]

For summary judgment purposes, a question of contract interpretation under the context rule "is to be determined by the trier of fact" only if "it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence." *Berg*, 115 Wn.2d at 658 (quoting Restatement (Second) of Contracts § 212). "Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law." *Id.*

Here, there was no need for the trial court to weigh the credibility of extrinsic evidence or choose among reasonable inferences, as HCA suggests, because (i) extrinsic evidence of the parties' course of performance is undisputed, and (ii) extrinsic evidence of the parties' course of dealing is undisputed.

a. The course of performance shows that Family Connects and Reconnects must be excluded in allocating enrollees.

A course of performance refers to "'[a] sequence of previous performance by either party after an agreement has been entered into,

[11] HCA's argument that the maxim of construing a contract against the drafter does not apply here misses the point. *See* HCA Br. at 30-31. Summary judgment in favor of CHPW should be affirmed based upon the plain language of the Contract, but if the Court concludes that the Contract is ambiguous, such ambiguity is to be construed against the drafter, which is the HCA.

when a contract involves repeated occasions for performance.'" *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 661, 266 P.3d 229 (2011) (quoting *Black's Law Dictionary* 405 (9th ed. 2009)). Here, the course of performance in the first four months of the Contract (over one-fifth of the Contract's term) was that HCA did not count Family Connect and Reconnect clients in determining whether a managed care organization received its allocated percentage of Potential Enrollees. Only after the New Plans complained that they were receiving fewer enrollees than they anticipated did HCA begin counting Family Connect and Reconnect clients as though they were unassigned "Potential Enrollees."

HCA's course of performance and prior understanding of the contractual enrollee allocation process demonstrates that its new found interpretation of the Contract is mere argument without evidence. First, HCA admits that its initial allocation of enrollees was consistent with the requirements of the RFP and the Contract. In its August 23, 2012 email to the health plans, HCA stated that it had "strictly followed" "the RFP assignment protocol" but that this "resulted in inequitable enrollment." CP 191. In addition, in an internal "decision paper" generated a few days before the agency emailed the plans about the methodology change, HCA stated that it had been following the contractually required assignment

methodology, but wanted to "alter" or "modify" it going forward. CP 1422-23. HCA also found that the New Plans' perceived enrollment shortfalls were the result of the New Plans' "ill-informed assumptions" about enrollment volumes and an "[a]bsence of [a] transparent Medicaid enrollment process." CP 1422.

HCA's "decision paper" also discussed whether, instead of modifying/adjusting the enrollment percentages, it could address the New Plans' enrollment complaints by relaxing the regulatory Reconnect policy. *Id.* Obviously, there would be no need to change the Reconnect policy (which would require a rulemaking) if HCA's existing Contract required HCA to make the desired adjustments to the current assignment process.

HCA's own statements confirm that HCA did not make an error in executing the Contract's assignment methodology; instead, it implemented it as written but later altered it to appease the New Plans who were unhappy with their enrollment volumes. Its Division Director for Health Care Services, Preston Cody, acknowledged as much in an email written the same day HCA circulated its "decision paper," in which he stated: "I'm not really interested in changing the 12 month reconnect policy, rather change the methodology on how we reduced the assignment pool." CP 1555. One month later, on September 23, 2012, HCA's Manager of Quality and Care Management, Barbara Lantz ("Lantz"), wrote to Cody

about her recent meeting with Coordinated Care's CEO Jay Fathi, M.D., where Dr. Fathi "started out of the gate asking how we were going to address the 'errors' in enrollment." CP 1564. Lantz "explained that these were not errors per se, but rather a new interpretation of our business process." *Id.*

That HCA initially applied the assignment methodology "as written" is further confirmed in a document that HCA generated weeks after it decided to change the methodology. In that document, HCA noted that the New Plans received "a lower number of assignees than anticipated" and confirmed that this was not an error:

> This finding is not attributed to a ProviderOne programming glitch. The methodology was applied as written. The methodology in the RFP did not take into account the number of clients assigned through the plan reconnection or family reconnection process . . . .

CP 3296 (emphasis added).

Finally, HCA's intent to exclude Family Connect and Reconnect clients from the assignment pool is further confirmed by the position taken by HCA staff (who were responsible for drafting the RFP and the Contract) in HCA's dispute resolution hearing position paper and at the hearing. There, HCA never argued that it had mistakenly implemented the Contract. Instead, HCA staff, along with its assigned Assistant Attorney

General, argued in the hearing only that HCA had the right to modify the assignment percentages during the term of the Contract through an unrelated contractual provision that addressed suspension of enrollment. CP 699-702. Obviously, if the Contract had been implemented incorrectly, in a manner inconsistent with the parties' intent, there would be no need to argue that the Contract permitted unilateral modification by HCA. CP 2260-61.[12]

HCA's admissions and shifting legal positions are compelling evidence of a course of performance that excluded Reconnect and Family Connect clients from the contractual assignment methodology. HCA's suggestion that no course of performance can be established by "one month of performance in error" is neither accurate nor persuasive. HCA Br. at 28. At least twice during the initial months of the Contract, HCA applied the assignment methodology to exclude Family Connect and Reconnect clients from the calculation of each plan's share of unassigned enrollees (for the months of July and August) before notifying CHPW of any issue. CP 194. HCA cites no authority holding that this does not establish course of performance. *See Spradlin*, 164 Wn. App. at 661

[12] Also, if the Contract had simply been implemented incorrectly, it would stand to reason that HCA would have made enrollment adjustments for the entire contract period, retroactive to July 1, 2012, rather than make the adjustments effective with November 2012 enrollment.

(three payments constituted a course of performance). Moreover, HCA's own statements manifest its understanding of its performance during the initial months of the Contract— i.e., that the "[assignment] methodology was applied as written." CP 3296.

b. Identical operative language in the parties' prior contracts and the parties' undisputed interpretation of them demonstrate that the Contract's allocation formula for unassigned provisions did not apply to Family Connect and Reconnect clients.

A course of dealing refers to "'a sequence of previous conduct between the parties to an agreement which . . . establish[es] a common basis of understanding for their [agreement].'" *Puget Sound Fin., L.L.C. v. Unisearch, Inc.*, 146 Wn.2d 428, 436, 47 P.3d 940 (2002) (quoting Restatement (Second) of Contracts § 223 (1981)). Unless otherwise agreed, a course of dealing gives meaning to, supplements or qualifies the parties' agreement. *Id.*; *see, e.g.*, *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 590-92, 269 P.3d 1017 (2012) (where municipal franchise agreements did not expressly provide for fire hydrants, city's operation of hydrants for years showed the parties intended they be provided).

A course of dealing encompasses performance under a prior contract or series of contracts. *See Diamond "B" Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 70 P.3d 966 (2003) (in

dispute whether contract allowed plaintiff subcontractor to select supplier and manufacturer of equipment, defendant's allowance of subcontractor to make selection under earlier similar contract demonstrated parties' intent).[13]

Washington courts follow Restatement (Second) of Contracts § 223 in considering and enforcing a course of dealing. *See Puget Sound Fin.*, 146 Wn.2d at 436. Section 223 includes the following illustration, which is analogous to this case:

> A, a sugar company, enters into a written agreement with B, a grower of sugar beets, by which B agrees to raise and deliver and A to purchase specified quantities of beets during the coming season. No price is fixed. The agreement is on a standard form used for B and many other growers in prior years. A's practice is to pay all growers uniformly on a formula based on A's "net return" according to A's established accounting system. Unless otherwise agreed, the established pattern of pricing is part of the agreement.

[13] The Petitioner-Intervenors argue that the prior course of dealing between CHPW and HCA is irrelevant because course of dealing "applies only where the parties to a subsequent contract are the same, which is not the case here." Pet.-Interv. Br. at 20. This contention is wrong and, like many of the Petitioner-Intervenors' arguments, attempts to erase the line between their respective contracts with HCA and the Contract at issue here. The fact remains that this dispute is for breach of the CHPW-HCA Contract, and the only parties to the Contract are CHPW and HCA, who are the same parties involved in the prior contracts that contained identical operative language as to how the assignment pool is defined.

Restatement (Second) of Contracts § 223 cmt. b., illus. 1. Similarly, absent an express provision otherwise, HCA's practice of excluding Family Connect and Reconnect clients from its allocation methodology for many years under its prior contracts with CHPW under identical operative language is part of the present agreement.

Here, it is undisputed that prior Healthy Options agreements between CHPW and the state (HCA's predecessor agency, the Department of Social and Health Services) dating back to at least 2008 contained identical language in its "Assignment of Enrollees" section, which, like the Contract at issue here, identified the population to be assigned among the plans through an allocation formula as "[p]otential enrollees who do not select a HO" plan. CP 905, 910, 2959.[14] The prior contract also contained the same definition of "Potential [HO] Enrollees" that was carried over to the current Contract, i.e., a Medicaid recipient "eligible for enrollment . . . who is not enrolled with a health plan having a contract

[14] The fact that the prior contract's assignment mechanism for those potential enrollees (which was based on contractor capacity) differed from the mechanism in the Contract at issue (which is based on weighted percentages) is irrelevant. The issue is still which Medicaid beneficiaries make up the pool of "Potential Enrollees" and "potential enrollees that do not select" a Healthy Options plan. Those terms are identical from contract to contract, though now HCA suggests that they be interpreted differently. HCA Br. at 29.

with" the state Medicaid agency. CP 2930 (2008-2009 Contract § 3.41), 83 (2012-2013 Contract § 1.70).[15]

It is further undisputed that, in the prior agreement, the state excluded Family Connect and Reconnect client from the pool of enrollees available for contractual assignment. As Lindeblad testified:

> Q Well, in those contracts from 2009 to 2012, the parties, including the HCA, excluded from the pool to be allocated as new members the Family Connect enrollees and the Plan Reconnect enrollees?
>
> A That's my understanding, yes.

CP 1409. The prior course of dealing was also confirmed by Lantz, who manages the HCA unit responsible for managed care program contracting. *See* CP 1502 ("I learned that, historically, we had not included Family Connects and Reconnects in the overall pool of individuals assigned for purposes of assignment.").

Despite the undisputed course of dealing, HCA argues that the parties intended that the Contract, despite having identical language with

[15] The small difference between the term "Potential HO Enrollees" in the instant Contract and "Potential Enrollees" in the prior contract (i.e., the reference to "Health Options") reflects that the current Contract encompassed Medicaid beneficiaries enrolled in the Basic Health and Healthy Options programs, but contained an assignment methodology that applied only to Healthy Options enrollees. The difference also provides incontrovertible proof that, when HCA drafted the Contract, it considered this term and kept the operative definition the same. Consequently, there is no basis to conclude that HCA knowingly defined a term in the Contract identically to the same term used in prior contracts, but intended that it be interpreted completely differently.

the previous contract defining Potential Enrollees and the pool of clients who were subject to contractual assignment, introduced an entirely different methodology that now includes Family Connect and Reconnect clients in the assignment pool, and thus counts them against CHPW's proportional share of unassigned Potential Enrollees. No evidence supports that argument. Indeed, the record reveals no evidence that HCA communicated that supposed significant change in policy through the Contract's terms or otherwise. In fact, HCA admits that it did not expressly notify CHPW (or Molina) of this change in interpretation at any time until after the Contract was signed and implemented and the dispute resolution hearings were over. CP 1413-15.

HCA argues instead that CHPW somehow should have been on notice of HCA's unannounced change of interpretation because the Contract was intended to broadly provide preferential treatment to the New Plans. Again, that speculative inference from HCA's unilateral intentions has no basis in evidentiary fact and cannot defeat summary judgment based on the uncontroverted course of dealings between the parties. As discussed above, the policy favoring enrollment in the New Plans was already reflected in the Contract's preferential allocation of Potential Enrollees to the New Plans (i.e., the first 50% of unassigned enrollees in counties where they were newly doing business). There is no

contractual language upon which HCA further favors the New Plans, the operative terminology is identical to prior contracts (i.e., defining the pool of enrollees subject to contractual assignments as "potential enrollees who have not chosen" a health plan and defining "potential enrollees" the same) and there is no evidence in the record that HCA advised anyone of its new interpretation of that language before the Contract was signed and implemented. Thus, summary judgment for CHPW is entirely consistent with the language of the Contract and the course of performance.[16]

C. CHPW Is Entitled to Summary Judgment that HCA Breached the Dispute Resolution Provisions in the Contract (Procedural Breach).

The trial court properly awarded summary judgment to CHPW for the additional reason that there was no issue of material fact that Lindeblad's appointed designee who heard CHPW's dispute resolution hearing, Judge King, was prevented from determining the parties' dispute despite the Contract's dispute resolution provisions specifying that any designee appointed by the Director for purposes of a dispute resolution hearing was to "hear and determine the matter." CP 90.

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[16] Also unavailing is HCA's argument that CHPW's lawsuit is trying to achieve relief that it "could not get through the elected branches." HCA Br. at 35. HCA refers to CHPW's and Molina's lobbying efforts during the RFP process to protest the RFP's assignment methodology, which favored the New Plans by application of the 50% assignment preference for the New Plans. CP 3138-39. CHPW's efforts to change the RFP's 50% assignment preference had nothing to do with HCA's application of the Family Connect and Reconnect policies to the enrollee assignment process, and nothing in the documents cited by HCA suggests otherwise.

1. The Unambiguous Contract Language Required that Judge King "Hear and Determine" the Dispute Resolution Hearings.

"Interpretation of an unambiguous contract is a question of law." *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995). Therefore, summary judgment is appropriate if a contract is unambiguous, even if the parties dispute the legal effect of a provision. *Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). A contract term is unambiguous when a reading of the contract leads to only one meaning. *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 917, 468 P.2d 666 (1970). A term is not ambiguous merely because the parties suggest opposing meanings. *Id.* at 918-19. Ambiguity is not read into a contract that is otherwise unambiguous. *Mayer*, 80 Wn. App. at 420 (citing *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965)); *see also McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983) ("[A]mbiguity will not be read into a contract where it can reasonably be avoided . . . .").

Words should be given their plain and popular meaning. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). The word "and" is conjunctive, as opposed to the word "or," which is disjunctive. *Pine Corp. v. Richardson*, 12 Wn. App. 459, 470, 530 P.2d

696 (1975) (noting that there is "no ambiguity" when a contract term "is stated in the conjunctive 'And,' and not in the alternative 'or'"); *see also Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 619, 192 P.3d 306 (2008) ("[T]he word 'and' is conjunctive, joining the two elements 'so that the second logically qualifies the first[.]'") (quoting *Webster's Third New International Dictionary* 80 (2002)); *Wash. Monumental & Cut Stone Co. v. Murphy*, 81 Wash. 266, 270, 142 P. 665 (1914) (an argument that did not consider "and" in the conjunctive "hardly merits further notice").

The contractual provision at issue here is unambiguous. HCA and Petitioner-Intervenors tacitly concede as much by failing to even address the relevant language in their briefs. The Contract required that any delegate appointed by the Director for dispute resolution purposes "hear and determine" the parties' dispute. CP 90 (Contract § 2.9.2). The word "and" is unambiguously conjunctive. "And" conjoins the words "hear" and "determine" to mean that the Director's designee under Section 2.9.2 would be contractually appointed to both "hear" and "determine" the matter. *See Wash. Monumental*, 81 Wash. at 270; *Pine Corp.*, 12 Wn. App. at 470; *Merriam-Webster Collegiate Dictionary* 46 (11th ed. 2012). Lindeblad herself agreed that "and" is "conjunctive" and that nowhere does the Contract authorize the Director to treat "and" disjunctively by

allowing an appointee to hear the matter while reserving to the Director the right to make the final determination. CP 1605-06. The Contract plainly states that the designee will "hear and determine the matter," and therefore bifurcation of these duties between two individuals is a breach of the Contract. Further, there can be no dispute that "determine" means to "fix conclusively or authoritatively." *Merriam-Webster Collegiate Dictionary* 7340 (11th ed. 2012).

2. Extrinsic Evidence Supports "and" in Section 2.9.2 of the Contract as Conjunctive.

Although the plain and unambiguous language of the Contract is sufficient to support CHPW's claim for breach of contract, *Absher Constr.*, 77 Wn. App. at 141, extrinsic evidence may also be considered when only one reasonable inference can be drawn from the evidence. *U.S. Life Credit Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996); *Scott Galvanizing, Inc. v. Nw. EnviroServs., Inc.*, 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993). The extrinsic evidence here creates just one reasonable inference—that once Judge King was appointed, he was contractually required to both "hear and determine" the dispute.

Further, the evidentiary record is clear that HCA acted in a manner consistent with the unambiguous language of Section 2.9.2 from the time it assigned Judge King to "hear and determine the matter" until after it

learned that Judge King had determined that HCA's unilateral modification of the assignment methodology was a breach of the Contract.

First, HCA treated Judge King as a neutral arbiter who could independently consider both sides. Beginning in September 2012, Lindeblad and her staff specifically sought to delegate the dispute to a person who had no prior experience with the RFP process. CP 1640. If Judge King were not authorized to determine the dispute resolution hearings, his neutrality would not have been critical to his appointment under Section 2.9.2.

Second, HCA distanced Judge King from ex parte communication during the dispute resolution hearings. Once Judge King was confirmed as Lindeblad's designee, HCA appointed legal counsel (Assistant Attorney General ("AAG") Melissa Burke-Cain) to advise Judge King and a different AAG (Stephens) to advocate on HCA's behalf during the hearings. CP 1646. There would be no reason for Judge King to require independent legal advice during the hearings if he was not being asked to "determine" the dispute following the hearings.

Third, when asked for the procedural requirements of the dispute resolution hearing, HCA representatives sent Judge King "Section 2.9 related to the dispute process," which plainly stated his duty to both "hear

and determine" the hearings without any limitation on his authority. CP 1648.

In addition, Lindeblad's disengagement with the dispute resolution hearings is consistent with Judge King's contractual authorization to both "hear and determine" the dispute resolution hearings. Lindeblad was not privy to the dispute resolution hearings because she did not attend them and HCA did not have them transcribed. CP 1613, 1659. Further, at no point did Lindeblad or anyone at HCA prepare written decisions regarding the dispute resolution hearings within the contractual time limit, seemingly a precondition to Lindeblad's supposed intention to retain decision-making authority despite the Contract's direction that Judge King "hear and determine" the matter.

In sum, HCA did nothing to contradict its delegation of authority to Judge King to determine the matter.[17] Regardless, even if somebody at

[17] HCA's brief argues that "Mr. King never was given, never was told, and never testified that he was vested with final decision-making authority." HCA Br. at 42. That argument is both misleading and lacks an evidentiary basis. First, HCA sent Judge King a copy of Section 2.9.2, excerpted from the Contract, to guide him in his role, which contains the operative language that the Director's designee is to "hear and determine the matter." CP 1648. Thus, Judge King was told that he was vested with decision-making authority and there is no evidence in the record that he was given any limiting instruction. As a result, Judge King testified that he understood that he would "decide" the matter and then "meet with Ms. Lindeblad before issuing any decision." CP 1653-54. He understood that "his decision was going to go out one way or the other, [but] it was a question of whether it'd be over [his] signature or [Lindeblad's]." CP 1655. HCA grossly mischaracterizes Judge King's testimony when it states that Judge King "acknowledges his scope of designation was limited." HCA Br. at 42. In the cited testimony, Judge King simply noted that he was to meet with Lindeblad "prior to sending

HCA had limited Judge King's authority, there was no contractual basis to do so.[18]

Accordingly, the only reasonable inference that can be drawn from HCA's actions under the Contract is that Judge King was contractually required to hear and determine CHPW's dispute.

3. Lindeblad's Unexpressed Intention Not to Delegate Her Decision-Making Authority to Judge King Is Irrelevant and Confirms HCA's Intention to Breach the Contract.

Because Judge King was required to "hear and determine" CHPW's dispute with HCA on the enrollee allocation issue, it was a breach of the Contract for HCA to prevent his decisions from determining the parties' dispute. HCA's contention that the Contract gave Lindeblad "full authority to delegate all or only a portion of the tasks related to the dispute conferences" is facially inconsistent with the plain meaning of Section 2.9.2, which contains the phrase "hear and determine," not to mention common notions of due process. The fact that Lindeblad now claims that she subjectively "did not want to delegate the final outcome of

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out any written work" (CP 3213) and confirmed that Lindeblad never discussed with him her subjective intent about his role (CP 3223).

[18] By contrast, HCA's subsequent form Medicaid managed care contract, which took effect on January 1, 2014, permits any designee appointed by the Director to hear the parties' contractual dispute, but solely authorizes the Director to determine the matter. *See* CP 1809 ("The Director, at his or her sole discretion, may appoint a designee to represent him or her at the dispute conference. If the Director does appoint a designee to represent him or her at the dispute conference, the Director shall retain all final decision-making authority regarding the disputed issue(s). Under no circumstances shall the Director's designee have any authority to issue a final decision on the disputed issue(s).").

the process" is immaterial, and, at most, probative only of her intent to breach the parties' Contract even before the dispute resolution hearings occurred. HCA Br. at 44. Lindeblad's unexpressed subjective intent regarding her delegation to Judge King is irrelevant when construing an unambiguous contract term. If HCA in fact "did not want" anyone other than its Director to determine the final outcome of the dispute resolution hearing, it could have drafted the Contract's dispute resolution provisions differently, as it did in its draft of the subsequent contract between the parties.[19]

4. Washington Law Permits HCA's Director to Delegate Her Decision-Making Authority, Which Lindeblad Chose to Do Under the Contract.

By law the Director has the authority to contractually delegate final decision-making to another, as HCA chose to do in the Contract. RCW 41.05.021(1) (HCA Director may "delegate any power or duty vested in . . . her by law, including authority to make final decisions and enter final orders in hearings.") (emphasis added). Thus the contractual delegation of her authority to Judge King is both consistent with and expressly contemplated by her statutory authority.

[19] *See* note 18, *infra* (the 2014 Medicaid contract permits any designee appointed by the Director to hear the parties' contractual dispute, but authorizes only the Director (and no one else) to determine the matter. CP 1809.

5. That the Dispute Resolution Process Was Not a Formal Hearing Under the APA Does Not Mean that the Parties to the Contract Intended the Dispute Resolution Hearing Provisions to Permit a Sham Proceeding.

HCA's protest that CHPW's dispute resolution hearing was not an Administrative Procedure Act ("APA") hearing is likewise irrelevant to whether HCA breached the Contract. CHPW has never contended that the APA governed the parties' dispute or applied to the contractual dispute resolution hearing. Instead, CHPW argues that HCA failed to follow the plain terms of the dispute resolution provisions that it designed and drafted as part of the Contract. Under those terms, Lindeblad's designee (whom she herself determined should be a Health Law Review Judge) was to hear and determine the dispute.

The fact that the Contract did not require an APA-style hearing does not mean that the parties intended that the dispute resolution provisions of the Contract authorized the type of sham proceeding that HCA and the Petitioner-Intervenors suggest is acceptable. For example, there is no evidentiary (or logical) basis to suggest that the parties contemplated that the dispute resolution process would conclude with the written opinion of the judge-designee who presided over the hearing being discarded by Lindeblad, who did not attend the hearing, in favor of a contrary opinion authored on an ex parte basis by the attorney who advocated for one side at the hearing and which was based on a theory of

contractual intent never before articulated by HCA, let alone argued at the hearing. Indeed, it is little wonder that the trial court found that the proceedings as implemented by HCA were "an affront to reasonableness." CP 3367. The suggestion that the parties actually intended such a sham proceeding should be rejected as similarly unreasonable. *See Berg*, 115 Wn.2d at 672.

6. CHPW Did Not Earlier Discover the Procedural Breach Because HCA Hid Judge King's Decisions from CHPW.

Again avoiding discussion of the plain language of the Contract, HCA argues that CHPW is equitably estopped from challenging the Director's actions because it did not earlier challenge Lindeblad's usurping Judge King's authority. HCA Br. at 46. This argument is factually baseless: CHPW could not challenge the Procedural Breach before the litigation began because HCA hid Judge King's favorable decision from CHPW until after the litigation was initiated. Instead of timely acknowledging to CHPW that Lindeblad's decision contradicted Judge King's findings, HCA buried his determination and misled CHPW about whether Lindeblad's decision was consistent with Judge King's by alluding to her consultation with him. *See* CP 1770 ("Accordingly, under Section 2.9.2 of the Contract, and after conferring with Mr. King, my recommendation is as follows") (emphasis added). CHPW did not know of the existence of Judge King's favorable determination until it received a

copy of it in response to a public records request, well after the litigation was filed. When asked why she had not revealed Judge King's decision to CHPW beforehand, Lindeblad's testified that sharing Judge King's decision "wasn't a consideration." CP 1622. Immediately after learning of Judge King's favorable decision, CHPW and Molina amended their complaint to add a claim for the Procedural Breach.

7. No Declaratory Relief Is Needed to Establish a Breach of Contract.

In yet another argument that avoids discussion of the clear language of the dispute resolution provisions, HCA further argues that CHPW's procedural breach of contract claim is actually a claim for declaratory relief, which CHPW cannot pursue because it voluntarily dismissed all of its equitable claims. HCA Br. at 48-49.

CHPW does not seek or require declaratory relief with respect to the Procedural Breach. Its claim is simple breach of contract—i.e., that HCA and Lindeblad breached the dispute resolution provisions of the Contract by not permitting Judge King's determination to issue and that CHPW was damaged thereby. Petitioners do not and cannot dispute that as of November 1, 2012, HCA altered how it allocated unassigned Healthy Options enrollees among the health plans, causing assignment of fewer enrollees to CHPW and more enrollees to the New Plans.

Judge King's determination found that this unilateral alteration was a breach of contract. No "declaratory ruling" is needed that Judge King's determination was a final agency action. HCA Br. at 49. The Contract itself makes plain that Judge King, as Lindeblad's designee, was to "hear and determine the matter." CP 90. The fact that his determination was in draft form is irrelevant; Judge King testified, and no evidence in the record refutes, that the draft of his decision was "[his] final word on the subject" and that he was simply "tinkering with [the] language" when Lindeblad terminated his involvement. CP 1675. His draft determination did not become final because HCA buried it, not because Judge King had not yet decided how the dispute was to be resolved.

Because the contractual dispute resolution process is the parties' "sole administrative remedy," *see* CP 90 (Contract § 2.9.3), Judge King's determination of CHPW's dispute was, and should have been permitted to issue as, HCA's final decision, effectively ending the dispute. The notion suggested by HCA that Lindeblad could have somehow overruled that determination by "subsequently deciding the Contract had been incorrectly interpreted and that no unilateral amendment was necessary" is absurd. HCA Br. at 47-48. Lindeblad's retention of the authority to overrule Judge King's decisions would render the term "determine" meaningless. If HCA desired a different outcome for its dispute resolution process, it

had another option: draft different dispute resolution provisions, as it did in its subsequent contract. Or Lindeblad could have chosen to hear and determine the matter herself. But the Contract did not grant her unbridled discretion in resolving the dispute; in particular, it did not permit her to determine the matter without hearing it. Rather, the Contract presented Lindeblad with a binary decision: (1) preside over the matter herself or (2) assign the authority to determine the matter to a designee. She chose the latter. Her dissatisfaction with her designee's determination does not permit her to usurp that determination from Judge King—at least not without breaching the Contract.

D. The Trial Court's Decision Is Not Contrary to "Due Process" Because No Process Was Due to the New Plans, Who Were Not Parties to the Contract Between HCA and CHPW.

Petitioner-Intervenors argue that the trial court's decision is contrary to due process because Judge King's decision would have somehow determined the legal rights of the New Plans under their contracts with HCA. This argument ignores the fact that each plan has a separate contract with HCA under which each plan may request a dispute resolution hearing with HCA if a dispute arises. Indeed, despite the fact that CHPW and Molina had identical disputes with HCA concerning HCA's modification of the assignment methodology, HCA and Molina separately requested dispute resolution hearings and two separate hearings

were held. Molina did not attend CHPW's dispute resolution hearing, and CHPW did not attend Molina's hearing. CP 1727, 1737.[20] The Contract does not give any other health plan a right to attend or participate in another plan's dispute resolution hearing with HCA. CP 90.

Petitioner-Intervenors identify no source of their alleged right to notice or an opportunity to intervene in CHPW's dispute resolution hearing with HCA. Pet.-Interv. Br. at 21. That the New Plans theoretically might have been affected by Judge King's decision is irrelevant to a determination of CHPW's breach of contract claim against HCA, which concerns CHPW's Contract with HCA, including CHPW's course of dealing with HCA that preceded entry into the Contract, to which the New Plans may not have always been privy (e.g., the prior contracts with identical language and performance thereunder).

Any dispute between the Petitioner-Intervenors and HCA would arise under the Petitioner-Intervenors' individual contracts with HCA (which gave each plan the opportunity to request a hearing in the event of a dispute), and would involve each of those plans' unique interactions and negotiations with HCA. If the New Plans felt aggrieved by the outcome of CHPW's or Molina's dispute resolution hearing, the New Plans had the

[20] In fact, HCA prohibited CHPW from attending Molina's hearing even as an observer. CP 3226-27.

identical right under their contracts to request a dispute conference and then seek judicial review of an unfavorable decision.[21] Further, the entire matter could have been resolved through the state's payment of money damages to either the Legacy Plans or the New Plans, depending on whose interpretation the state favored. Thus, the determination of the CHPW dispute resolution hearing did not necessarily affect the New Plans at all, if HCA simply compensated CHPW for the damage caused by the change in assignment methodology.

In any event, Petitioner-Intervenors do not explain how the trial court's ruling on the Procedural Breach, if upheld, affects their rights or interests in any way. And it does not, for two reasons. First, the Healthy Options contract at issue expired on December 1, 2013, so the disputed enrollee assignment methodology involves the past assignments of enrollees to the New Plans that cannot be undone, and the sole remaining remedy sought is damages against HCA. Second, the summary judgment orders made clear that the New Plans are not liable to CHPW for damages

[21] It should be noted that the Petitioner-Intervenors, after receiving Lindeblad's decision that changed the methodology from November 1, 2012 through December 31, 2013, could have but did not request a dispute resolution hearing under their own contracts to challenge the exclusion of Family Connect and Reconnect clients from the allocation pool from the July 1, 2012 effective date of their contracts through October 31, 2012, after which the methodology was changed. It rings hollow that the Petitioner-Intervenors should claim a deprivation of due process under CHPW's contract when they did not avail themselves of process due under their own contracts on this very issue.

because liability rests exclusively with HCA. CP 3331, 3336. Thus, Petitioner-Intervenors are not and cannot be damaged by the ultimate outcome of CHPW's breach of contract claim.

As part of their due process argument, Petitioner-Intervenors also argue that Judge King's determination could not have been HCA's determination because "the contract did not provide for a binding dispute resolution process." Pet.-Interv. Br. at 21.[22] That argument ignores the plain meaning of the word "determine," a result that is to be avoided under general principles of contract interpretation. *See Cambridge Townhomes*, 166 Wn.2d at 487. They further argue that Judge King's determination, even if it were given effect, "would be of no consequence" because HCA or the New Plans could have just "brought a lawsuit and the exact same question of contract interpretation would be before the court for de novo review." Pet.-Interv. Br. at 22 n.6. This argument also ignores the word "determine" and is procedurally baseless. Judge King was the HCA Director's designee under the Contract and found that HCA breached the

[22] Petitioner-Intervenors grossly mischaracterize the evidence in order to make the false assertion that "the Legacy Plans acknowledge that Director Lindeblad would be the one making the decision." Pet.-Interv. Br. at 22 (citing CP 3231). The cited November 7, 2012 letter references Judge King as Lindeblad's "designee" and notes that Judge King indicated that he should have a decision issued within 'the next few days.'" The letter concerns the delay in issuing a final decision given Lindeblad's plan to hold a meeting with the five health plans on November 19. The letter's citation to the dispute resolution clause's requirement that a decision from the Director "or [her] designee" issue within 30 days of the dispute resolution hearing is hardly an admission that CHPW believed that Lindeblad could or would determine the matter.

Contract by modifying the assignment methodology. HCA cannot seek judicial relief from what was effectively its own action. *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1075 (9th Cir. 2010) ("[A]n agency cannot appeal its own decision[.]").[23] And even if it could, its actions would still be a breach of the Contract, which required that the Director's designee "hear and determine the matter." As to the New Plans' filing suit, the Petitioner-Intervenors do not explain how they would have had standing to challenge the outcome of a dispute involving CHPW's Contract with HCA and the mutual understandings thereunder. Petitioner-Intervenors were not third-party beneficiaries of the CHPW-HCA Contract, nor did they exhaust their administrative remedies under their own contracts with HCA, which required that a dispute resolution hearing precede any judicial process involving their contracts. CP 90.

E. The Trial Court Properly Determined that the Substantive and Procedural Breaches Caused HCA to Assign Fewer Enrollees to CHPW and that Damages Would Be Determined at a Later Proceeding.

There is no requirement that a plaintiff establish in a partial summary judgment motion the precise amount of damages caused by a defendant's breach of contract. CR 56(c). The amount of damages can and will be proved in a later hearing or at trial. The record reflects and it

[23] It is unclear how HCA would even frame a lawsuit challenging its own designee's decision (would it sue itself?), much less how HCA could succeed in challenging its own finding that it breached the Contract.

cannot be disputed that HCA's modification of the assignment methodology and thus breach of contract was intended to and did cause a reduction in assignments of Medicaid managed care beneficiaries to CHPW: HCA modified the contractual assignment methodology in October 2012 by reducing the number of Potential Enrollees assigned to CHPW and Molina and assigning a greater number to the New Plans effective with the November 2012 enrollment. CP 1625-26, 193-94.

As to the Procedural Breach, CHPW was entitled to the Contract's requirement that Judge King "determine the matter," and it is uncontroverted that Judge King found that HCA's modification to the assignment methodology was a breach of the Contract. CHPW was deprived of this "benefit of the bargain," and there is no dispute that it suffered damages because, as Lindeblad conceded, had Judge King's determination been given effect, HCA would have needed to "reverse" and "change back" its modification to the enrollee assignments that further benefitted the New Plans. CP 1626-28.

Thus, the trial court did not err in concluding that HCA's Procedural Breach caused CHPW damages. In the oral ruling, the court noted HCA's actions were designed to and did result in the New Plans' getting "a greater portion" of enrollees than they otherwise would have received if HCA had not breached the Contract. HCA cannot dispute that

its actions resulted in the shifting of new enrollees away from CHPW and Molina to the Petitioner-Intervenors. The only remaining issue is the value of the lost enrollees to CHPW, which will be determined at a damages trial.

V. CONCLUSION

For the reasons discussed above, the trial court's orders granting summary judgment to CHPW should be AFFIRMED.

DATED: November 26, 2014

PERKINS COIE LLP

By: _____

David B. Robbins, WSBA No. 13628
DRobbins@perkinscoie.com
Renee M. Howard, WSBA No. 38644
RHoward@perkinscoie.com
Matthew P. Gordon WSBA No. 41128
MGordon@perkinscoie.com
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Respondent
Community Health Plan of Washington

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that today I caused to be served the foregoing document on all parties:

Party	Service
William T. Stephens Attorney General's Office P.O. Box 40124 Olympia, WA 98504-0124 Telephone: 360.586.6565 *Attorneys for Defendants MaryAnne Lindeblad Washington State Health Care Authority*	E-mail, per parties' agreement bills3@atg.wa.gov timc1@atg.wa.gov nataliec@atg.wa.gov kristib3@atg.wa.gov pattij@atg.wa.gov robert.rice@atg.wa.gov christineh1@atg.wa.gov
Matthew J. Segal Gregory Wong Pacifica Law Group 1191 Second Avenue, Suite 2100 Seattle, WA 98101 *Attorneys for Intervenor Coordinated Care Corporation*	E-mail, per parties' agreement matthew.segal@pacificalawgroup.com greg.wong@pacificalawgroup.com jamie.lisagor@pacificlawgroup.com katie.dillon@pacificlawgroup.com
Shawn Larsen-Bright Peter Ehrlichman Dorsey & Whitney 701 Fifth Ave, Suite 6100 Seattle, WA 98104 *Attorneys for Intervenor United Healthcare*	E-mail, per parties' agreement ehrlichman.peter@dorsey.com larsen.bright.shawn@dorsey.com masterson.nancy@dorsey.com sterner.amy@dorsey.com

Party	Service
Mary Re Knack Manish Borde Williams Kastner 601 Union Street, Suite 4100 Seattle, WA 98101 *Attorneys for Intervenor Amerigroup Washington, Inc.*	E-mail, per parties' agreement mknack@williamskastner.com mborde@williamskastner.com llisty@williamskastner.com dlevitin@williamskastner.com mphilomeno@williamskastner.com mbarger@williamskastner.com

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 26th day of November, 2014, at Seattle, Washington.

Julie DeShaw

79851-0003/LEGAL 124308509.3

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mknack@williamskastner.com
mborde@williamskastner.com